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(35280)

IN THE

Supreme Court of the United States

at the

OCTOBER TERM, A.D., 1930

No. 358

INTERSTATE TRANSIT, INC.
Appellant

VS.

DICK LINDSEY
Appellee

APPEAL FROM SUPREME COURT OF TENNESSEE

BRIEF OF APPELLANT INTERSTATE TRANSIT, INC.

THOS. L. TALLENTIRE,
J. CARLTON LOSER,
H. LYNNE BARBER,
J. G. LACKEY,
Counsel for Appellant.

BROWN PRINTING CO.

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IN THE

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at the

OCTOBER TERM, A.D., 1930

No. 358

INTERSTATE TRANSIT, INC.
Appellant

VS.

DICK LINDSEY
Appellee

May It Please the Court:

(This is an appeal under Sec. 237 (a) of the Judicial Code (Sec. 344, U. S. C., Title 28), as amended by Chap. 229, 43 Stat., 936, Act of Feb. 13, 1925, and effective May 13, 1925.)

This suit was instituted by the appellant, Interstate Transit, Inc., in Part I of the Chancery Court at Nashville, Tennessee, against Dick Lindsey, County Court Clerk of Davidson County, Tennessee, appellee, to recover One Thousand and Twelve ($1,012) Dollars, paid by it to the said Clerk as privilege taxes

on eight 29-passenger busses used by appellant in the interstate transportation of passengers for hire in Tennessee. Said $1,012 sought to be recovered in this case represents the tax and fees for one-quarter of a year on eight busses, amounting to One Hundred Twenty-six ($126.50) Dollars and Fifty Cents per bus.

(R. 5.)

In the Trial Court the Chancellor decreed in favor of appellant, Interstate Transit, Inc., holding it was entitled to recover the sum of $1,012.00 on the theory that appellant was engaged solely in the interstate transportation of passengers for hire in Tennessee, and that it was not "doing business" therein, so as to make it liable for the tax.

(R. 15.)

Appellee, Dick Lindsey, County Court Clerk, excepted to the action of the Chancellor in decreeing against him, and prayed an appeal to the Supreme Court of Tennessee sitting at Nashville.

(R. 16.)

The Supreme Court of Tennessee, upon consideration of the said appellee, Dick Lindsey, held that in the decree of the Chancellor there was error. It was therefore ordered and decreed by the Supreme Court of Tennessee that the decree of the Chancellor be reversed, and the original bill of appellant, Interstate Transit, Inc., be dismissed.

(R. 27.)

This proceeding seeks to review on appeal the decree and judgment of the said Supreme Court of Tennessee, and to reverse its action for the errors herein complained of.

(R. 36.)

STATEMENT OF THE CASE

Averments of the original bill of complainant, answer and stipulation of facts touching matters not material to a determination of the cause in this Honorable Court, will not be referred to in this brief.

Allegations of the Original Bill of Interstate Transit, Incorporated

That it is a corporation, organized and existing under the laws of the State of Ohio, with its home or principal place of business in the city of Cincinnati, Ohio.

(R. 1.)

That its charter of incorporation authorizes the operation for hire of motor busses for the transportation of passengers interstate as a common carrier.

(R. 1.)

That it is now, and has been for some time, engaged in the transportation of passengers for hire between the states, and that it operates, in addition to other lines, an interstate bus line between Cincinnati, Ohio,

and Atlanta, Georgia, over highways traversing the states of Ohio, Kentucky, Tennessee and Georgia.

(R. 1.)

That Dick Lindsey, appellee herein, is the regularly constituted, elected and acting County Court Clerk of Davidson County, Tennessee.

(R. 2.)

That it, in pursuance of and under its charter powers, and in the exercise of rights guaranteed under the Constitution of the United States, established a route between Cincinnati, Ohio, and Atlanta, Georgia, through Nashville, Tennessee, over highways traversing the states of Ohio, Kentucky, Tennessee and Georgia, and that said highways over said route in Tennessee and other states were constructed jointly by the Federal Government and the several states through which said route passes.

(R. 2.)

That it is engaged exclusively in the transportation of passengers interstate and not intrastate. No passenger is received in Tennessee for transportation by it in Tennessee, but all passengres transported by appellant are discharged in a state other than the state in which such passenger embarks, and the route traversed by the appellant in the operation of its lines is interstate, and it carries passengers exclusively interstate.

(R. 2.)

That Chapter 89 of the Public Acts of Tennessee for the year 1927 (Revenue Bill) provides as follows:

Section 4 thereof (page 284 of published volume) provides:

> "That each vocation, occupation and business hereinafter named in this section, is hereby declared to be a privilege, and the rate of taxes on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of such revenue."
>
> (R. 2-3.)

At pages 290 and 291 of published volume it is provided as follows:

STATE PRIVILEGE TAX ONLY

> "Each person, firm or corporation operating an automobile bus carrying passengers upon the highways of this State for a distance of more than ten miles per trip, and not liable for a privilege tax under the foregoing provision, shall pay as follows:
>
> "Each bus carrying over twenty passengers and less than thirty passengers, per annum ---------- $500.00.
>
> "Provided, that this tax shall be in lieu of all county and municipal taxes; provided, further, privilege taxes accruing under this heading shall

go and belong exclusively to the general funds of the State."

(R. 4.)

That it paid to Dick Lindsey, County Court Clerk of Davidson County, Tennessee, a privilege tax on eight 29-passenger busses for one quarter of a year, in the sum of One Hundred Twenty-Six ($126.50) Dollars and Fifty Cents each, amounting to One Thousand and Twelve ($1,012.00) Dollars. Said privileges taxes were paid involuntarily and under protest, and that this suit is instituted to recover said sum.

(R. 5.)

That said privilege tax is a revenue measure and the proceeds therefrom go and belong exclusively to the general funds of the State. Such a tax on complainant's operations is an unreasonable burden on interstate commerce, and therefore void. The proceeds of such privilege taxes are not used in the construction and maintenance of highways, but go into the general funds of the State.

(R. 7.)

That it has paid for and obtained license tags which are attached to its busses operating in Tennessee. The funds derived from the payment for such license tags are used directly in the construction and maintenance of Tennessee highways. In addition to this, complainant pays a state tax of five (5) cents per gallon for gasoline purchased in

Tennessee, which five-cents tax per gallon on gasoline is used exclusively for highway construction and maintenance in Tennessee.

(R. 7-8.)

That said privilege tax of Five Hundred ($500.00) Dollars per annum per bus on busses carrying over twenty passengers and less than thirty passengers, in addition to hundreds of dollars paid annually for the gasoline tax, and a license tax of about Seventy-Five ($75.00) Dollars per year per bus, is grossly excessive and exorbitant, and is an unreasonable burden on interstate commerce.

(R. 8.)

That the interstate transportation of passengers for hire by motor-propelled vehicles over the highways of the United States is "commerce between the states," and is protected by the Commerce Clause of the Federal Constitution.

(R. 8.)

That Federal aid in the construction of highways in the several states makes clear the purpose of Congress that said highways shall be open to interstate commerce. Any tax placed on such business by the State as compensation for the privilege of carrying on such business, is an unreasonable burden on such commerce, and in conflict with Article 1, Section 8, Clause 3, of the Constitution of the United States of America.

(R. 8.)

That it is not "doing business" in Tennessee, but is engaged exclusively in the transportation of persons for hire by motor vehicle from points in one state to points in another state, over Federal-aid highways.

(R. 9.)

That it has the right to carry on said business under the Federal Constitution, it being a field reserved by the Commerce Clause for Federal regulation.

(R. 9.)

Prayer of the Bill

1. That subpoena to answer issue, requiring him to answer the bill, but his oath is waived.

2. That the Court decree complainant is not liable for a privilege tax on any of its busses operating interstate in Tennessee under Chapter 89 of the Public Acts of 1927.

3. That complainant have and recover of the defendant the sum of $1,012.00 and the costs of this cause.

4. That complainant have such further and other relief as it may be entitled to.

(R. 9.)

Answer of Dick Lindsey, County Court Clerk

It is denied that complainant is not liable for a privilege tax as claimed in the original bill, but on

the contrary the defendant avers that the complainant is liable for the privilege tax mentioned under the terms and provisions of Chapter 89 of the Public Acts of 1927.

(R. 11.)

That said Act levies a privilege tax against the business of complainant and that said levy is in all things valid, and in no way impinges on any article of the Constitution of the United States.

(R. 11.)

That the defendant alleges that the operations of complainant, in and through Tennessee, bring it under the Revenue Act in question, and that the complainant is liable for the tax provided in said Act. It is denied that said tax constitutes an unreasonable burden on interstate commerce, or any burden at all—it is denied that said Revenue Act, or that part of it levying a privilege tax against the complainant, is unconstitutional and void as violating the Commerce Clause of the Federal Constitution, or for any other reason.

(R. 11.)

Stipulation of Facts

No proof was taken in this cause, but certain facts were agreed upon, as follows:

1. That the Interstate Transit, Inc., is a corporation, organized and existing under the laws of the State of Ohio, and that its charter of incorporation

authorizes it to engage in the interstate transportation of persons for hire by motor bus.

(R. 13.)

2. That the Interstate Transit, Inc., paid to the County Court Clerk, Dick Lindsey, the sum of One Thousand and Twelve ($1,012.00) Dollars as a privilege tax on eight 29-passenger busses, used by complainant in the interstate transportation of passengers for hire in Tennessee, and that said payment was for one-quarter of a year's privilege tax, and includes a clerk's fee of $1.50 per bus. That said tax was paid by complainant involuntarily, under protest and by reason of duress employed by the defendant.

(R. 13.)

3. That the tax sought to be recovered in this cause was levied by defendant under Chapter 89, Acts of 1927 (Revenue Bill), pages 290 and 291 of the Published Acts. That at the time the tax in question was paid involuntarily, the complainant was engaged exclusively in the interstate transportation of passengers for hire by motor bus in Tennessee, . . . and had complied with all the police regulations of the State, including the fees for a license tax and the tax of five (5) cents per gallon on gasoline.

(R. 13-14.)

5. That the tax complained of was levied under the Revenue Bill of the State of Tennessee for the

year 1927, and that said funds go and belong exclusively to the general funds of the State, and that no portion of said tax is used directly in the construction and maintenance of highways, nor does any part of said tax go to or is used by any agency or board in Tennessee charged with the duty of regulating or supervising bus operations, either intra- or interstate.

(R. 14.)

6. That the Interstate Transit, Inc., operates its busses interstate, over a route or highway constructed jointly by the Federal Government and the State of Tennessee, and maintained by the State of Tennessee, the line being between Cincinnati, Ohio, and Atlanta, Georgia, via Louisville, Kentucky, and Nashville, Tennessee.

(R. 14.)

Decree of the Chancellor

This cause came on to be heard on the 27th day of February, 1930, before the Honorable R. B. C. Howell, Chancellor, upon the original bill, answer thereto, stipulation as to evidence, and upon argument of counsel, from a consideration of all of which the Court was pleased to find as follows:

(a) That the complainant, Interstate Transit, Inc., is engaged solely in the interstate transportation of passengers for hire in Tennessee, and is not "doing business" therein so as to make it liable for the tax.

(R. 14-15.)

(b) That the complainant, Interstate Transit, Inc., have and recover of the defendant, Dick Lindsey, County Court Clerk, the sum of One Thousand and Twelve ($1,012.00) Dollars, together with the costs hereof.

(R. 16.)

Appeal of Dick Lindsey, County Court Clerk

The defendant, Dick Lindsey, excepted to the action of the Chancellor in decreeing in favor of the Interstate Transit and against him, and prayed and perfected an appeal to the Supreme Court of Tennessee sitting at Nashville.

(R. 16.)

Proceedings in the Supreme Court of Tennessee, at Nashville, Tennessee

The fifth assignment of error in the Supreme Court of Tennessee by Dick Lindsey, County Court Clerk, is the only assignment material at this time, which is as follows:

> "The Chancellor erred in refusing to hold and decree that the complainant (Interstate Transit, Inc.) was liable for said privilege tax, even though engaged exclusively in the operation of interstate busses, because such tax can be lawfully levied and collected from a bus operator using the highways of the State in interstate operations, as such operator's fair and reasonable

contribution to the cost of constructing and maintaining the highways of the State; and it makes no difference that the tax is not levied and collected for the use of the highway fund itself, so long as the State, out of their funds, looks after the proper and necessary maintenance and upkeep of the highways over which the operator carries on his operation as is done by the State in this case."

(R. 19.)

Opinion of Supreme Court
(R. 20-26)

The Supreme Court of Tennessee held that the Revenue Act in question applied, and that the tax was valid, reversing the decree of the Chancellor and dismissing the bill of the Interstate Transit, Inc.

(R. 26.)

Said the Court:

"This appeal calls for a construction in application of section 4, Chapter 89, of the Revenue Act of 1927. This bill was filed to recover privilege taxes paid to the Clerk under protest by an Ohio corporation operating passenger motor busses, known as Colonial Stages, between Cincinnati, Ohio, through Kentucky and Tennessee, via Louisville, Nashville and Chattanooga to Atlanta, Georgia.

* * * *

"The corporation says that it transports interstate only, that therefore the Act does not, fairly construed, embrace it, and that if construed

to embrace it, the tax levied would be in contravention of the Federal Constitution. (Article 1, Section 8, Clause 3.)

"The State insists (1) that the corporation transports both intra-state and interstate, and therefore comes within the terms of the Act, and (2) that even though its business is interstate only, the Act applies and the Federal Constitution does not prohibit its application.

"The Chancellor found on the record made that the corporation was doing interstate transportation only, and that the State is precluded by the Commerce Clause of the Federal Constitution from collection of the tax. While the proof shows some disposition on the part of the employees of the corporation to wink at and make easy an evasion of the interstate policy of the corporation, through the use of tickets calling for destinations immediately over the State line, we think the record as a whole sustains the finding of the Chancellor that the rules and regulations of and the instructions issued by the corporation, together with the form and recital of its tickets, make out a case of interstate business only.

(R. 21.)

* * * *

"Clear as it is, both on principle and authority, that the State may exact a charge for the use of its highways, without reference to whither the user comes, or whence he goes, we are not of the opinion that the form or name of the charge is determinative of the right. Nor are

we persuaded that the right is defeated by a failure to designate in the Act by restrictive terms the fund into which the proceeds are primarily to go. *This is hardly more than a matter of bookkeeping. Once in the general funds of the State, as provided by this Act, it is subject to distribution and allocation in any direction where it may be found to be most needed. If it meets or relieves the State's requirements in one direction, more is left for application in another.* (Italics ours.)

(R. 24.)

* * * *

"We are of opinion that the Revenue Act applies and that the tax is valid. The decree must be reversed and the bill dismissed."

(R. 26.)

Said decree and opinion of the Supreme Court of Tennessee was entered on the 28th day of June, 1930.

(R. 27.)

Petition of Interstate Transit, Inc. For Appeal to Supreme Court of The United States

On August 2, 1930, the appellant, Interstate Transit, Inc., filed its petition for appeal to the Supreme Court of the United States, averring that on June 28, 1930, the Supreme Court of Tennessee made and entered a final order and judgment in this cause in favor of Dick Lindsey, County Court Clerk of Da-

vidson County, Tennessee, in which final order and judgment, and proceedings had prior thereunto in this case, certain errors were committed greatly to the prejudice of the petitioner, all of which were set out in detail in the assignment of errors, which was filed with the petition in the Supreme Court of Tennessee.

(R. 37-38.)

The Interstate Transit, Inc., further showed that Chapter 89 of the Public Acts of Tennessee for the year 1927, Section 4 thereof, as construed by the Honorable Supreme Court of Tennessee, was in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, in that it placed an unreasonable burden on interstate commerce.

(R. 35.)

The petitioner further showed that the said judgment of the Supreme Court of the State of Tennessee was and is a final judgment in the highest court in the State of Tennessee, in which Court a decision in said suit could or can be had,

(R. 35.)

The Interstate Transit, Inc., further showed in said petition that a Federal question was made in said case, to wit, as hereinbefore set out, and that said judgment of the Supreme Court of Tennessee was, and is, repugnant to and in conflict with the Federal Constitution, and particularly with Article I, Section 8, Clause 3, of the Constitution of the Uni-

ted States as aforesaid, and the decision of said Federal question was necessary to the judgment rendered.

(R. 36.)

The appeal as prayed for in said petition was allowed on the 3rd day of August, 1930, and bond fixed therefor in the sum of $1,000.00 by the Honorable Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

(R. 36.)

Assignment of Errors

Interstate Transit, Inc., filed an assignment of errors at the time said appeal was allowed by the Chief Justice of the Supreme Court of Tennessee, on August 2, 1930.

(R. 37-38.)

Order Allowing Appeal

On August 2, 1930, an order was entered in the Supreme Court of Tennessee, allowing the appeal sought in this case to the Supreme Court of the United States, upon the execution of bond in the sum of $1,000.00, conditioned as the law directs.

(R. 39.)

Writ of error issued by the Clerk of the United States District Court for the Middle District of Tennessee on August 2, 1930.

(R. 39.)

Bond for the said appeal in the sum of $1,000.00 was executed and approved by the Chief Justice of the Supreme Court of Tennessee on August 2, 1930, and citation issued in the usual form showing service on L. D. Smith, Attorney-General for the State of Tennessee.

(R. 39.)

Statement of Points Relied Upon And Designation of Record

The appellant, Interstate Transit, Inc., filed in this Honorable Court on August 22, 1930, a Statement of Errors upon which it intended to rely in this case, and the parts of the record which it thought necessary for the consideration thereof.

(R. 39-40.)

Said Statement of Errors was the same as the Assignment of Errors filed in the Supreme Court of Tennessee with the petition for appeal on August 2, 1930.

(R. 40-41.)

The record as designated by appellant, Interstate Transit, Inc. (R. 41-42), has been filed by the Clerk of this Honorable Court, being file No. 35280.

Said Statement of Errors, together with Designation of Record, was served upon the appellee, Dick Lindsey, by delivering to him a copy thereof on the 20th day of August, 1930, which service was

acknowledged by L. D. Smith, Attorney-General for the State of Tennessee.

(R. 39-42.)

Jurisdictional Statement of The Appellant, Interstate Transit, Inc.

In compliance with Paragraph 1 of Rule 12, of the Rules of the Supreme Court of the United States, appellant, Interstate Transit, Inc., filed a printed statement, particularly disclosing the basis on which it was contended this Honorable Court had jurisdiction to review on appeal the judgment or decree of the Supreme Court of Tennessee rendered in this case.

Said printed statement was dated August 25, 1930, a copy of which was furnished counsel for appellee, Dick Lindsey. Forty copies of said statement were forwarded to the Clerk of this Honorable Court and filed therein on August 28, 1930. There was also forwarded to said Clerk under date of August 26, 1930, proof of service of statement as to jurisdiction in this case.

On October 20, 1930, the Court, after consideration of the Jurisdictional Statement filed in this case, pursuant to Rule 12, announced a finding "that probable jurisdiction has been noted."

ASSIGNMENT OF ERRORS

Appellant, Interstate Transit, Inc., respectfully makes the following Assignment of Errors, upon which it relies and urges in the prosecution of its appeal from the decree made by the Supreme Court of Tennessee on the 28th day of June, 1930:

I.

That the Supreme Court of Tennessee erred in decreeing that the privilege tax levied by Section 4 of Chapter 89 of the Acts of Tennessee for the year 1927, is a valid and reasonable tax on interstate commerce.

II.

That the Supreme Court of Tennessee erred in decreeing that the privilege tax of Five Hundred ($500.00) Dollars per annum per bus engaged exclusively in interstate commerce, by transporting passengers for hire across the State of Tennessee, as levied by Section 4, Chapter 89, Acts of Tennessee for 1927, is reasonable, and consonant with the Commerce Clause of the Federal Constitution, being Article I, Section 8, Clause 3 thereof.

III.

That the Supreme Court of Tennessee erred in decreeing that the privilege tax levied on interstate bus operators by Section 4, Chapter 89, Acts of Tennessee for 1927, is consonant with the Commerce Clause

of the Federal Constitution, although the proceeds from said tax go and belong exclusively to the general funds of the State; is fixed in an arbitrary amount, and is the same for busses doing intra- and interstate business.

IV.

That the Supreme Court of Tennessee erred in decreeing that the privilege tax levied by Section 4, Chapter 89, Acts of Tennessee for 1927, is valid and constitutional, although said tax is found in a revenue measure, and no part of the proceeds is used for highway maintenance and construction.

V.

That the Supreme Court of Tennessee erred in decreeing that Section 4 of Chapter 89, Acts of Tennessee for the year 1927, is a regulatory measure, when the proceeds of said tax go into the general funds of the State and is found in the 1927 Revenue Bill of Tennessee.

VI.

That the Supreme Court of Tennessee erred in decreeing that Section 4 of Chapter 89, Acts of Tennessee for the year 1927, is a reasonable charge on exclusive interstate bus operations as their fair contribution to the cost of constructing and maintaining the public highways, when appellant and all others similarly situated are required, under the laws and

statutes of Tennessee, to pay a registration or license fee per vehicle to said state, according to capacity and weight of such vehicle; an excise tax of five (5) cents per gallon on gasoline purchased and used in Tennessee, and an inspection fee of $2.50 per bus seat per anum, the entire proceeds from the three levies being impressed with a trust, being exacted for highway maintenance and construction exclusively, and to cover the cost of inspection of equipment so used. Said three levies are in addition to the tax in question.

(R. 37-38.)

BRIEF AND ARGUMENT

It is respectfully insisted by appellant, Interstate Transit, Inc., that Chapter 89, Public Acts of Tennessee for the year 1927, as construed by the Supreme Court of Tennessee, is repugnant to Article I, Section 8, Clause 3, of the Federal Constitution (Commerce Clause), and therefore void.

All questions of fact, upon which the jurisdiction of this Honorable Court depends, have been found and determined in favor of appellant.

The Chancellor (trial court) found that the "Interstate Transit, Inc., is engaged solely in the interstate transportation of passengers for hire in Tennessee, and it not 'doing business' therein so as to make it liable for the tax."

(R. 15, Par. 3.)

The Supreme Court of Tennessee held that the Interstate Transit, Inc., was engaged in interstate business only.

(R. 21.)

And the Stipulation of Facts, agreed between counsel representing the parties, shows appellant "was engaged exclusively in the interstate transportation of passengers for hire by motor bus in Tennessee," since certain disputed facts were held by the Chancellor and the Supreme Court insufficient to constitute "doing business" in Tennessee.

(R. 13.)

Therefore, it follows that appellant, Interstate Transit, is engaged solely in the interstate transportation of passengers for hire by motor bus.

Interstate Commerce

The transportation of passengers for hire by motor bus interstate is "commerce between the states."

Buck v. *Kuykendall*, 267 U. S., 307, 45 S. Ct., 324.

Geo. W. Bush v. *Maloy*, 267 U. S., 317, 45 S. Ct., 326.

Tax on Interstate Commerce Invalid

It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the re-

ceipts derived therefrom, or the occupation or business of carrying it on.

Ozark Pipe Line Corp. v. *Monier*, 266 U. S., 555, 45 S. Ct., 184.
Leloup v. *Mobile*, 127 U. S., 640, 648, 8 S. Ct., 1380; 32 L. Ed., 311.
Kansas City Ry. v. *Kansas*, 240 U. S., 227, 231, 36 S. Ct., 261; 60 L. Ed., 617.
Brown v. *Maryland* (1827), 12 Wheaton, 419.
Robbins v. *Taxing District* (Tennessee), 120 U. S., 489; 30 L. Ed., 694.
Binderup v. *Pathe Exchange*, 263 U. S., 263; 68 L. Ed., 388.
Texas Transport v. *New Orleans*, 264 U. S., 150; 68 L. Ed., 611.
Sprout v. *South Bend*, 277 U. S., 163, 171, 72
Hosiery Mills v. *Portland*, 268 U. S., 325; 69 L. Ed., 982.
L. Ed., 833, 837; 48 S. Ct. Rep., 502.

Sprout v. *South Bend*, next hereinabove cited, is directly in point. Defendant City of South Bend, by legislative grant, prohibited the operation on its streets of any motor bus unless licensed by the city. Sprout, a resident of South Bend, Ind., operated regularly a bus with seats for twelve persons between points within South Bend and the City of Niles, Mich. He paid the state registration fee, but refused to pay the city license. The license fee varied with seating capacity and for a 12-passenger bus was $50.00 a year. The act provided that operating within South Bend without paying the license fee con-

stituted a misdemeanor. Sprout refused to obtain the license and was arrested and fined $50.00 by the municipal court. Sprout defended, among other things, that the ordinance violated the commerce clause of the Federal Constitution. The fine imposed was sustained by the highest court of the State of Indiana. (198 Ind., 563, 153 N. E., 504.)

In an opinion by Mr. Justice Brandeis, concurred in by the entire Court, it is said:

> "The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. The distance from the north city limits of South Bend to Niles is about nine miles. Half of this distance lies within Indiana. Along the highway traversed within that State lies many suburban residences and one village tributary to South Bend. Sprout purported to offer transportation from that city only to persons destined to points in Michigan. He required that all passengers from South Bend pay the fare to some Michigan point. But, in fact, he served suburban passengers. He made stops habitually at points within Indiana in order to permit passengers from South Bend to leave the bus before the State line was reached. The legal character of this suburban bus traffic

was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. Compare *Philadelphia & Reading Ry. Co.* v. *Hancock*, 253 U. S., 284, 40 S. Ct., 512, 64 L. Ed., 907; *Baltimore & Ohio S. W. R. R. Co.* v. *Settle*, 260 U. S., 166, 171, 43 S. Ct., 28, 67, L. Ed., 189. The suburban traffic was intrastate commerce.

"The Supreme Court of Indiana, *Sprout* v. *City of South Bend*, 198 Ind., 563, 153 N. E., 504, 49 A. L. R., 1198, did not pass upon the question whether Sprout, by reason of the suburban traffic, was engaged also in intrastate traffic. Nor did it consider whether his rights as an interstate carrier would be affected by his engaging also in intrastate business. It affirmed the judgment of the trial court on the broad ground that, since Sprout made use of the streets in 'the indiscriminate solicitation and acceptance of passengers,' he was 'within the police power of the State to license and regulate both driver and vehicle by way of providing for the safety, security and general welfare of the public.'

"It is true that, in the absence of Federal legislation covering the subject, the State may impose, even upon vehicles using the highways ex-

clusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end, and that a license fee no larger in amount than is reasonably required to defray the expenses of administering the regulations may be demanded. *Hendrick* v. *Maryland*, 235 U. S., 610, 622, 35 S. Ct., 140, 59 L. Ed., 385; *Kane* v. *New Jersey*, 242 U. S., 160, 37 S. Ct., 30, 61 L. Ed., 222; *Morris* v. *Duby*, 274 U. S., 135, 47 S. Ct., 548, 71 L. Ed., 966; *Clark* v. *Poor*, 274 U. S., 554, 47 S. Ct., 702, 71 L. Ed., 1199. . . . But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee cannot be sustained as a police measure. *Atlantic and Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S., 160, 164, 23 S. Ct., 817, 47 L. Ed., 995; *Postal Telegraph Cable Co.* v. *New Hope*, 192 U. S., 55, 24 S. Ct., 204, 48 L. Ed., 338; *Barrett* v. *New York*, 232 U. S., 14, 32, 34 S. Ct., 203, 58 L. Ed., 483. Compare *Foote & Co.* v. *Stanley*, 232 U. S., 494, 503, 34 S. Ct., 377, 58 L. Ed., 698.

"It is true also that a State may impose, even on motor vehicles engaged exclusively even in interstate commerce, a reasonable charge as

their contribution to the cost of constructing and maintaining the public highways. *Hendrick* v. *Maryland*, 235 U. S., 610, 622, 35 S. Ct., 140, 59 L. Ed., 385; *Interstate Busses Corporation* v. *Blodgett*, No. 197, 276 U. S., 48 S. Ct., 230, 72 L. Ed., —, decided February 20, 1928, and this power also may be delegated in part to a municipality by appropriate legislation. Compare *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S., 92, 98, 13 S. Ct., 485, 37 L. Ed., 380; Id., 149 U. S., 465, 13 S. Ct., 990, 37 L. Ed., 810. An exaction for that purpose may be included in a license fee. *Hendrick* v. *Maryland*, *supra*; *Kane* v. *New Jersey*, 242 U. S., 160, 168-169, 37 S. Ct., 30, 61 L. Ed., 222; *Clark* v. *Poor*, 274 U. S., 554, 47 S. Ct., 702, 71 L. Ed., 1199. But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount, and same for busses plying the streets continuously in local service and for busses making, as so many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets. Compare *Tomlinson* v. *City of Indianapolis*, 144 Ind., 142, 43 N. E., 1, 36 L. Ed., 413; *City of Terre Haute* v. *Kersey*, 159 Ind., 300, 64 N. E., 469, 95 Am. St. Rep., 298;

Hogan v. *City of Indianapolis*, 159 Ind., 523, 65 N. E., 525.

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise, for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S., 692, 14 S. Ct., 1094, 38 L. Ed., 871; *Osborne* v. *Florida*, 164 U. S., 650, 17 S. Ct., 214, 41 L. Ed., 586; *Kehrer* v. *Stewart*, 197 U. S., 60, 25 S. Ct., 403, 49 L. Ed., 663; *Watters* v. *Michigan*, 248 U. S., 65, 39 S. Ct., 256, 68 L. Ed., 615. Compare *Interstate Busses Corporation* v. *Holyoke Street Ry. Co.*, 273 U. S., 45, 47 S. Ct., 299, 71 L. Ed., 530; *Arnold* v. *Hanna*, No. 155, 275 U. S., —, 48 S. Ct., 212, 72 L. Ed., —, decided January 16, 1928. And it may delegate a part of that power to a municipality. Compare *Postal Telegraph Co.* v. *Richmond*, 249 U. S., 252, 257, 39 S. Ct., 265, 63 L. Ed., 590. But in order that the fee or tax shall be valid it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate

business. *Leloup* v. *Port of Mobile*, 127 U. S., 640, S. Ct., 1380, 32 L. Ed., 311; *Crutcher* v. *Kentucky*, 141 U. S., 47, 58, 11 S. Ct., 851, 35 L. Ed., 649; *Barrett* v. *New York*, 232 U. S., 14, 30, 34, S. Ct., 203, 58 L. Ed., 483; *Bowman* v. *Continental Oil Co.*, 256 U. S., 642, 647, 41 S. Ct., 606, 65 L. Ed., 1139. Compare *Williams* v. *Talladega*, 226 U. S., 404, 417, 33 S. Ct., 116, 57 L. Ed., 275; *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S., 252, 39 S. Ct., 265, 63 L. Ed., 590. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged in interstate commerce, and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny. *Buck* v. *Kuykendall*, 267 U. S., 307, 45 S. Ct., 324; 69 L. Ed., 623, 38 A. L. R., 286; *Bush & Sons Co.* v. *Maloy*, 267 U. S., 317, 45 S. Ct., 326, 327, 69 L. Ed., 627. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax."

It will be observed that the tax complained of in the instant case is levied as a revenue measure, and the proceeds go into the general funds of the State, no part of which is used for highway construction or maintenance. No suggestion is even offered in the Revenue Bill as to its being a police regulation.

In fact, the Act in question (Revenue Bill, 1927)

negatives the idea of an exercise of the police power. Its caption is as follows:

> "An Act entitled 'An Act to provide for General Revenue for the State of Tennessee and the Counties and Municipalities thereof, to be known as the General Revenue Bill.' "
>
> (See copy Act in Appendix, page 61.)

Further illustrating that the Act in question is an exercise of the taxing power, we find the following in Section 4 thereof:

> "That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the 'rate of taxes on such privilege shall' be as hereinafter fixed. . . . "
>
> (Appendix, page 63.)

And the law-making body, in order to remove any doubt as to the purpose of the levy, after taxing each interstate bus carrying over twenty (20) passengers and less than thirty (30) passengers, Five Hundred ($500.00) Dollars per annum, provided as follows:

> "Provided, that this tax shall be in lieu of all county and municipal taxes; provided, further, privilege taxes accruing under this heading *shall go and belong exclusively to the General Funds of the State.*" (Italics ours.)
>
> (Appendix, page 64.)

It does not appear that the tax here in question was imposed as an incident to a scheme of regulation or inspection, nor that the proceeds were to be applied to defraying the expense of such a scheme of regulation or inspection, nor that the amount levied under the Act was no more than was reasonably required for the purpose. So it follows that the privilege tax enacted cannot be sustained as a police measure.

Sprout v. *South Bend*, 277 U. S., 163, 171; 48 S. Ct. Rep., 502.

Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U. S., 160, 164; 23 S. Ct., 817; 47 L. Ed., 995.

Barrett v. *New York*, 232 U. S., 14, 32; 34 S. Ct., 203; 58 L. Ed., 483.

The Supreme Court of Tennessee sustained the Act in question on the theory that the tax exacted was an excise or reasonable charge for the use of the highways.

(R. 24.)

In support of its position there was cited:

Sprout v. *South Bend*, 277 U. S., 163, 171.

Hendricks v. *Maryland*, 235 U. S., 610, 622; 59 L. Ed., 385.

Interstate Busses v. *Blodgett*, 276 U. S., 245; 72 L. Ed., 551.

Clark et al. v. *Poor*, 274 U. S., 557; 71 L. Ed., 1200.

(R. 22-23.)

Kane v. *New Jersey*, 242 U. S., 160; 61 L. Ed., 222.

(R. 26.)

There is no suggestion, either in the Act or in the opinion of the Court, that the levy was an excise or license fee exacted as a fair contribution to the cost of constructing and maintaining the public highways.

It cannot be assumed that any part of the tax here in question was prescribed for such a purpose. A flat tax of $500.00 per bus per annum, *and same for busses using the highways daily in intrastate business as busses crossing the State daily in interstate business, could hardly have been designed as a proper measure of the cost or value of the use of the highways.*

(R. 23.)

On the contrary, the Act specifically provides that the tax is for the privilege of engaging in the business of an interstate carrier, and that the *proceeds shall go into the general funds of the State.* And the Tennessee Court so observed, but referred to the proposition as a "matter of bookkeeping."

(R. 24.)

Quoting from the opinion of the Tennessee Court in the instant case (R. 24), we find this:

> "Clear as it is, both on principle and authority, that the State may exact a charge for the use of its highways, without reference to whither the user comes, or whence he goes, we are not of opinion that the form or name of the charge is determinative of the right. Nor are we persuaded that the right is defeated by a failure to designate in the Act by restrictive terms the

fund into which the proceeds are primarily to go. This is hardly more than a matter of bookkeeping. Once in the general funds of the State, as provided by this Act, it is subject to distribution and allocation in any direction where it may be found to be most needed. If it meets or relieves the State's requirements in one direction, more is left for application in another. It is a contribution to the upkeep of the State's government as a whole, and a large part of this upkeep cost is the item of highways."

(R. 24-25.)

While the opinion of the Court above quoted suggests that a large part of the upkeep cost of the government is the item of highways, it is not intimated that any part of the general funds of the State is used in highway maintenance or construction. On the contrary, highway funds for maintenance and construction are derived from the proceeds of two police measures, Chapter 58, Acts of 1923, as amended (Gasoline Tax of Five (5) Cents per gallon), and Chapter 73, Acts of 1917, as amended (Automobile Registration and License Law). Said two Acts are appended hereto at pages 77 and 81. There is no suggestion in the Act in question or in the construction put upon it by the Supreme Court of Tennessee, that the proceeds of the tax are, in any part, to be applied to the construction and maintenance of the highways of the State.

So it follows that the exaction of the privilege tax cannot be sustained either as an inspection fee,

or as an excise or charge for the use of the highways of the State.

Sprout v. *South Bend*, 277 U. S., 163, 48 S. Ct. Rep., 502.

While a state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce, it is to be recalled that the Chancellor held appellant to be engaged solely in interstate commerce, and the Supreme Court of Tennessee likewise so held.

(R. 21.)

And it was insisted by appellant in the courts below that such was the intention of the legislature in the passage of the Act.

(R. 6-7.)

It is respectfully insisted that it necessarily follows that the Supreme Court of Tennessee has sustained the validity of a tax placing a direct burden on interstate commerce.

Cudahy Packing Co. v. *Hinkle*, 278 U. S., 460, 49 Sup. Ct. Rep., 204, 73 L. Ed., 454, and *Helson* v. *Kentucky*, 279 U. S., 245, 49 Sup. Ct. Rep., 279, 73 L. Ed., 683, are recent cases passing upon the validity of a direct tax on interstate commerce, exacted as a charge for the right or privilege to carry on such business.

In Cudahy Packing Co. v. *Hinkle*, 278 U. S., 460, 466, the Court said:

"In *Alpha Portland & Cement Co.* v. *Massachusetts*, 266 U. S., 203, 218, 69 L. Ed., 916, 924, 44 A. L. R., 1219, 45 Sup. Ct. Rep., 477, we said:

" 'It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause, and the 14th Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Min. Co.* v. *Massachusetts*, 231 U. S., 68, 87, 58 L. Ed., 127, 134, 34 Sup. Ct. Rep., 15, tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved.'

"*Baltic Min. Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the princples approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*

"It follows that the decree of the Court below is erroneous and must be reversed."

This case is in line with *Looney* v. *Crane Co.*, 245 U. S., 178, 187, 62 L. Ed., 230, 235.

In the Cudahy Packing Co. case, Mr. Justice Brandeis dissented. In his dissenting opinion he said:

> "If the statute sought to impose a tax on corporations engaged wholly in interstate commerce, or if the taxes laid a direct burden upon interstate commerce, or if they were laid upon property without the State, or if they were unjustly discriminating, the fact that they are small in amount would, of course, be immaterial. *Sprout* v. *South Bend*, 277 U. S., 163 171, 72 Law Ed., 833, 837."

A state cannot interfere with interstate commerce through the imposition of a tax which is in effect a tax for the privilege of transacting such commerce.

> *Helson* v. *Kentucky*, 279 U. S., 245, 249, 73 Law Ed., 683.

The Court in this case said:

> "Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this Court, unnecessary to be cited, that a State law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the State under the Constitution. It is likewise settled that transportation by ferry from one State

to another is interstate commerce and immune from the interference of such State legislation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 217, 29 L. Ed., 158, 166, 1 Inters. Com. Rep., 382, 5 Sup. Ct. Rep., 826; *Vidalia* v. *McNeely*, 374 U. S., 676, 680, 71 L. Ed., 1292, 1295, 47 Sup. Ct. Rep., 758. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. *Gloucester Ferry Co.* v. *Pennsylvania*, supra, p. 204. A State cannot 'lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.' *Leloup* v. *Mobile*, 127 U. S., 640, 648, 32 L. Ed., 311, 314, 2 Inters. Com. Rep., 134, 8 Sup. Ct. Rep., 1380; *Lyng* v. *Michigan*, 135 U. S., 161, 166, 34 L. Ed., 150, 153, 3 Inters. Com. Rep., 143, 10 Sup. Ct. Rep., 725; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S., 555, 562, 69 L. Ed., 439, 442, 45 Sup. Ct. Rep., 184. While a State has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U. S., 185, 218, 41 L. Ed., 965, 976, 17 Sup. Ct. Rep., 604.

"The following are a few of the cases illus-

trating the many applications of these principles:

" 'A State statute imposing a tax upon freight, taken up within the State and carried out of it, or taken up without the State and brought within it, was held, in the State Freight Tax Case, 15 Wall, 232, 21 L. Ed., 146, to constitute a regulation of interstate commerce in conflict with the Constitution. The Court said (pp. 275, 276):

" 'Then why is not a tax upon freight transported from State to State a regulation of interstate transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of 2 cents per ton upon coal carried out of the State, may

impose one of $5.00. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines.'

" 'A State or State municipality is without power to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein (*Stockard* v. *Morgan*, 185 U. S., 27, 46 L. Ed., 785, 22 Sup. Ct. Rep., 576); or for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce (*McCall* v. *California*, 136 U. S., 104, 34 L. Ed., 391, 3 Inters. Com. Rep., 181, 10 Sup. Ct. Rep., 881; *Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S., 150, 68 L. Ed., 611, 34 A. L. R., 907, 44 Sup. Ct. Rep., 242.) Nor can a State impose a tax on alien passengers coming by vessels from foreign countries. *New York* v. *Compaignie Generale Transatlantique*, 107 U. S., 59, 27 L. Ed., 383, 2 Sup. Ct. Rep., 87. And see Passenger Cases, 7 How., 283, 12 L. Ed., 702. In *Minot* v. *Philadelphia*, W. & B. R. Co., 2 Abb. (U. S.), 323, 343, Fed. Cas., No. 9,645, it was held that a State law imposing a tax for the use within the State of locomotives, passenger and freight cars, and for the use of rolling stock generally, was a license fee exacted for the privilege of such use. It appearing that the larger portion of the locomotives, etc., were used for the interstate transportation of persons and property, the Court held that the stat-

ute constituted a regulation of such commerce. In the course of the opinion, by Mr. Justice Strong, it is said:

> " 'It is of national importance that in regard to such subjects there should be but one regulating power, for if one State can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may; thus commercial intercourse between States remote from each other may be destroyed.' "

Sprout v. *South Bend*, 277 U. S., 163, is controlling in the case at bar.

It is respectfully insisted by the Interstate Transit, Inc., that the Supreme Court of Tennessee has failed to distinguish between the two great powers of sovereignty, "taxing" and "police." The opinion of said Court cites as authorities supporting it:

Sprout v. *South Bend*, 277 U. S., 170.
Hendrick v. *Maryland*, 235 U. S., 610.
Interstate Busses Corp. v. *Blodgett*, 276 U. S., 245.
Clark et al. v. *Poor et al.*, 274 U. S., 577, and
Kane v. *New Jersey*, 242 U. S., 160.

The Sprout case announced the rule, or restated the rule, that a tax placed on the right to engage in interstate commerce was offensive to the Federal Constitution, while the other cases set out next hereinbefore illustrate the police power of the states.

They do not sustain nor support the decree and opinion of the Supreme Court of Tennessee in the instant case, but clearly illustrate the proposition of law contended for by the appellant herein.

In *Hendrick* v. *Maryland*, 235 U. S., 610, plaintiff-in-error was tried before a Justice of the Peace under a charge of violating the Motor Vehicle Law, in that he had driven his automobile from the District of Columbia into the State of Maryland without having procured a certificate of registration required by the Motor Vehicle Law; that is, had not procured a license tax under the laws of Maryland and had not registered with the Motor Vehicle Department. He defended on the ground that it was an attempt to regulate interstate commerce. The Court held that this was but an exercise of police power uniformly recognized as belonging to the states, and essential to the preservation of the health, safety and comfort of other citizens. The Act specifically provided that all moneys collected under this provision must be paid into the State Treasury to be used in the construction, maintaining and repairing the streets of Baltimore, and road building aided by the county or the state itself.

Appellant has complied with a similar statute in Tennessee.

Interstate Busses Corporation v. *Blodgett*, 276 U. S., 245, sustains the validity of mileage tax on interstate bus operations, levied as an excise on the use of the highway. The Act attacked as being an

unreasonable burden on interstate commerce specifically provided that the proceeds of the tax were to be applied to the maintenance of public highways in the State.

This again illustrates an exercise of the police power, and clearly supports the insistence of appellant and is no authority for the Supreme Court of Tennessee.

Clark et al. v. *Poor et al.*, 274 U. S., 554, contested the validity of a license fee on an interstate carrier for the maintenance and repair of the highways, and for the administration and enforcement of the laws governing the use of same.

Again this illustrates an exercise of the police power of the State and does not support the Supreme Court of Tennessee, but is authority for the position taken by appellant.

Kane v. *New Jersey*, 242 U. S., 160, was an attack upon the New Jersey Automobile Law by a non-resident of that state, which required automobilists using the public highways to obtain a license so to do and register the same under the statute. Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey without registering his automobile in said state and obtaining a license under the authority of same. It was contended by Kane, among other things, that the statute was invalid as to him, a non-resident, because it regulated interstate commerce.

As in the Hendrick case, the New Jersey act provided that moneys received in accordance with the provisions of the Act were to be used as a fund for the repair of the improved roads throughout the state, and the only difference between the Maryland case and the New Jersey case was, it appeared, that the fees collected under the New Jersey statute exceeded the amount required to defray the expenses of maintaining the regulation and inspection department.

This, too, is an exercise of the police power and illustrates clearly the proposition contended for by appellant, and in no wise supports the Tennessee Court.

The Act of the State of Ohio considered in the Clark case is identical with Chapter 58, Acts of 1929, known as the Tennessee Motor Vehicle Regulatory Act.

(See said Act in Appendix, page 67.)

The Tennessee Motor Vehicle Regulatory Act has been complied with by appellant and is in no wise involved in this litigation.

From a consideration of all the cases by the United States Supreme Court, it appears that all monetary exactions by a state from a business carrying on interstate commerce are direct burdens on such commerce, and therefore invalid, unless levied under the police power of the state; in other words, a regu-

lation affecting the public health, safety, convenience or welfare.

As was stated in *Alabama & N. O. Transportation Co.* v. *Doyle*, 210 Fed., 173, 194:

> "We may assume for the purposes of this opinion that this inquiry, whether the burden is 'direct' is only another form of the question, whether the Act is within the police power."

It will be observed by the Court that in every case affecting motor vehicles in interstate commerce where a monetary exaction is levied by the states on such commerce, the proceeds are primarily to be used for regulation, inspection, maintenance and construction of the highways and roads so used in interstate commerce. It is not insisted by appellant in this brief that an excise or license fee cannot be exacted by the State of Tennessee on motor vehicles engaged exclusively in interstate commerce as a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways, but it is respectfully insisted that such cannot be done under the taxing power, and such has not been done in Tennessee in the Act in question. If appellant's operations in Tennessee can be brought within the purview of the statute in question by referring the question to a "matter of bookkeeping," then interstate commerce in Tennessee can be destroyed.

Under the decision of the Supreme Court of Tennessee in the instant case, any occupation in interstate commerce (subject to State regulation), may be taxed by the State for the privilege of carrying on such business or occupation, and avoid the inhibition in the Constitution of the United States with reference to "regulating commerce among the several states" by referring the question to principles of bookkeeping.

The paramount and controlling question in the case, namely, "What is the purpose of the levy, as shown by the statute?" is swept aside by these words in the opinion of the Supreme Court of Tennessee:

> " . . . This is hardly more than a question of bookkeeping. Once in the general funds of the State, *as provided by this Act*, it is subject to distribution and allocation in *any direction where it may be found to be most needed.* . . . This is a contribution to the State's government as a whole. . . ." (Italics ours.)
>
> (R. 24-25.)

In the exercise of appellate jurisdiction of the Federal Supreme Court over state courts, the former court is bound by the construction of a state law adopted by its court of last resort. But the Federal Supreme Court, while bound by the construction of a state statute adopted by the said court of last resort, *is not concluded by its reasoning*, but must exercise an independent judgment when called

upon to determine the Federal question, whether the Act, as construed and applied, is repugnant to the restriction of the Federal Constitution.

Ward v. *Krinksy*, 259 U. S., 503; 42 S. Ct. Rep., 529; 66 Law Ed., 1033.

While not attempting in any wise to open a state question in this Honorable Court, we deem it proper to quote further from the opinion of the Supreme Court of Tennessee for the purpose of attacking its reasoning, since this Honorable Court will exercise an independent judgment in determining the Federal question.

Said the Supreme Court of Tennessee:

> "We think this section of our Revenue Act embraces in its terms busses transporting interstate. The caption of the pertinent paragraph reads, 'all busses . . . running into other States,' and in its body it levies the tax on 'each person, firm or corporation operating an automobile bus carrying passengers upon the highways of this State for a distance of more than ten miles per trip,' and not liable under the preceding paragraphs. A purpose is indicated by the ten-mile restriction to avoid burdening interstate transportation unreasonably, relieving from this tax in cases of incidental and inconsequential crossing of, or entry over, the State lines in the course of through traveling.

"We come then to this single issue: Is the power of the State to impose 'a reasonable charge' upon busses making use of its highways for interstate transportation limited to a regulation or license fee under the police power, as insisted, and confined to the legislation which appropriates the funds exclusively and specifically to highway purposes, either of regulation or maintenance? This insistence seems to be met by Mr. Justice Brandeis in *Clark* v. *Poor*, *supra*, who, after referring to the contention therein made that all of the tax is not used for maintenance and repair of the highways, said:

" 'This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs.' "

(R. 22-23.)

The preceding paragraphs of the Revenue Bill under consideration, and referred to in the first paragraph of the opinion of the Supreme Court quoted above, levies a privilege tax—

First: On busses operating and carrying passengers on regular or fixed routes from one point in this State to another point in this State; and

Second: On each bus operating and carrying passengers on regular or fixed routes from one point in one county to another point in the same county.

Therefore, a bus operator carrying passengers over a route interstate, but doing intrastate business, would not be liable under said preceding paragraphs, and the section of the Revenue Bill levying a tax on busses running into other states and carrying passengers in Tennessee for a distance of more than ten miles per trip was not enacted for the purpose of avoiding burdening interstate transportation unreasonably, but was for the purpose of levying a tax upon a class of bus operations not referred to in the preceding paragraphs of the Revenue Bill; that is, busses traversing highways interstate but engaged in intrastate business. The ten-mile restriction referred to by the Supreme Court of Tennessee as being a legislative intent not to burden unreasonably interstate transportation, in our humble opinion, was not for the purpose stated by the Tennessee Court, but to relieve incidental and inconsequential intrastate business in Tennessee from the payment of the tax as levied on intrastate business.

It is respectfully insisted by appellant that the power of the State to impose a reasonable charge upon busses making use of its highways for interstate transportation is limited to a regulation or license fee under the police power, or an excise for use of the highways, likewise under the police power, but does not insist, as suggested by the Supreme Court, that such legislation must appropriate the funds de-

rived therefrom *exclusively* and *specifically* to highway purposes, either of regulation or maintenance.

It would seem from the opinion of the Supreme Court of Tennessee that it was of the opinion that there was some great power residing in the State to exact the license fee or tax from interstate commerce operations different from the taxing and police powers.

We insist that the statute under consideration was enacted under one of these two great powers—the taxing power or the police power—and in order to determine under which power the Legislature acted, we must look to the terms and provisions of the Act in question. If, from the four corners of the Act, it appears that same is an exercise of the taxing power, there can certainly be no justification for its enactment since it is repugnant to the commerce clause of the Federal Constitution. If from a consideration of the statute it appears that it was enacted under the police power, then the next question is its reasonableness.

The Supreme Court of Tennessee seems to be of the opinion that the purpose for which the Act was passed, and the use to which the proceeds are put, are immaterial, and in support of its reasoning, it suggested that Mr. Justice Brandeis in *Clark* v. *Poor*, *supra*, held that the use to which the proceeds are to be put was not material.

Our contention is that these questions are material in determining whether the Act in question is an exercise of the taxing or the police power. Mr. Justice Brandeis in *Clark* v. *Poor, supra,* in answer to an allegation that "all of the tax is not used for maintenance and repair of highways," held that this was immaterial; that is, all of the tax was not used for highway purposes. It will be borne in mind that in the Clark case, the tax was assessed for a *proper purpose* and was not *objectionable* in amount. Therefore, the use to which the proceeds were put was not a matter which concerned the plaintiff in that case.

Then, too, it will be recalled that Mr. Justice Brandeis delivered the opinion of the Court in the Sprout case, which held that a $50.00 exaction on the right to engage in interstate commerce in Indiana was repugnant to the Constitution of the United States and void.

As stated before, this argument is not presented for the purpose of opening a State question, but to respectfully show that the reasoning of the Supreme Court of Tennessee in the instant case is unsound and unsupported by any decision of the Supreme Court of the United States referred to by the said Tennessee Court in its opinion, or by any other decision of said Court.

Further quoting from the opinion of the Supreme Court of Tennessee:

"An interstate passenger bus might as consistently contend against a toll charge over a bridge as against a charge for traversing a State-owned highway. The record shows that the fare for a single passenger across the State is $3.50, and a tax on a twenty-passenger bus is $350.00 per year. Assuming that a bus makes but one trip a day, it traverses more than two hundred (200) miles of this highway at a charge of less than $1.00 for each fifteen (15) to twenty (20) passengers. The tax thus appears to be entirely reasonable."

(R. 24.)

The Court is in error as to the rate of taxes per year on appellant's bus, when it states that such tax is $350.00 per year. The tax as set out in the Revenue Bill and which is sought to be recovered in this case, is Five Hundred ($500.00) Dollars per annum. Therefore, the reasoning of the Court as to the reasonableness of the statute is inapplicable.

It is certainly unreasonable and so burdens interstate commerce, and is discriminatory, when a local bus of the same size and capacity which runs up and down the highways of Tennessee all day and all night, is taxed $500.00 per annum, and an interstate bus that makes but one trip daily across the State, as suggested by the Supreme Court of Tennessee, is likewise charged $500.00 per annum.

We respectfully state to this Honorable Court that we are not attacking the principles of law announced

by the Tennessee Court in support of its opinion, or the principles announced in the several cases referred to therein, but are insisting that they are inapplicable in the case at bar, do not support it, and are not authority in support of the conclusion of the Tennessee Court, but that the cases of the United States Supreme Court cited therein announce the principles for which appellant is insisting; that is to say, that in determining whether a State statute is an exercise of the police or the taxing power, we must look to the four corners of the statute, and a taxing statute cannot be sustained as an Act of the police power by referring the question to a system of bookkeeping, or the like.

And the fact that a State *may* levy an excise for the use of the roads by an interstate bus, will not justify a direct tax on interstate commerce as a charge for the privilege of engaging in such business.

The opinion of the Tennessee Court attempts to sustain its decree *on a proposition of power* residing in the State rather than on the *legislative intent* expressed in the statute.

Even had the Legislature, in the statute in question, provided that the levy was an excise tax as a reasonable charge for the use of Tennessee highways by interstate busses, and further provided that the proceeds (or a substantial part thereof), were to be used for highway regulation, construction and main-

tenance, there would be presented a serious question as affecting its validity, since the amount of the tax is determined by the seating capacity of the bus rather than the equitable mileage basis tax.

Seating capacity as a means of determining the amount of the tax does not remotely suggest that the levy in question is an excise on the use of the highways. Then, too, the tax is the same on all busses of like seating capacity, whether used in intra- or interstate commerce.

Under the police power an excise tax on interstate busses must bear some relation to the amount of the use of the highways, so as to avoid unreasonableness. It is apparent that a flat tax based on seating capacity, on all interstate busses, without reference to the miles traversed in the State by said busses, would be grossly inequitable and unreasonable. For instance, an interstate bus operating between Memphis, Tenn., and Washington, D. C., via Nashville, Knoxville, Johnson City and Bristol, Tenn., would traverse some seven hundred (700) miles of Tennessee highways, while such an operation between Louisville, Kentucky, and Birmingham, Alabama, via Hopkinsville, Kentucky, and Nashville, Tennessee, would traverse slightly more than one hundred (100) miles of Tennessee highways. If the busses used in such operations were of the same seating capacity; that is to say, a 29-passenger bus were used on the Memphis-to-Washington

route, and a 29-passenger bus were used on the Louisville, Kentucky, and Birmingham, Alabama, via Nashville, Tennessee, the tax would be $500.00 per annum under the statute, which would result in an unfair discrimination against the Louisville-Birmingham line. The only theory on which an excise tax can be exacted on interstate operations, is that the *use* bears some relation to the *benefits* obtained.

But the statute in question is a part of the General Revenue Bill for Tennessee, levied in a flat sum, the proceeds to go into the general funds of the State, and the same is levied as a *tax* on the *privilege* of *engaging* in such *business*.

And the fact that the tax is the same on all busses of like seating capacity, without reference to miles traversed in the State, indicates the levy is a *privilege* for the *right* to carry on *commerce* rather than an excise on the use of the roads. The discriminating feature of the statute that results from the construction placed upon it by the Tennessee Court is further evidence that the exaction is a tax on the right to carry on the business. Surely the Legislature would not have levied an excise for the use of the roads so unreasonable and discriminatory as is illustrated above.

A cursory examination of the Act in question will show conclusively that the tax sought to be recovered in this case is a levy made by the State of Tennessee

upon the right to engage in interstate commerce in said State. Section 12 of Chapter 89 of the Acts of Tennessee, 1927 (Revenue Bill), provides as follows:

> " . . . That it shall be unlawful for any person, firm or corporation to exercise any of the foregoing privileges before complying with the provisions of this Act; and any one exercising any of the foregoing privileges without paying the tax prescribed shall be guilty of a misdemeanor and liable to a fine of not less than $5.00, nor more than $50.00 per day for each day such privilege is exercised without license. . . ."

It is not only made unlawful by the Act in question to engage in interstate commerce before paying the tax, but it is made the duty of the Judges of the courts of this State having criminal jurisdiction to especially give in charge to, and have a grand jury of his court especially investigate all offenses defined in this Act, and inquisitorial powers are given to grand juries in the premises.

Section 17 of the Act in question provides as follows:

> "Section 17. Be it further enacted, That it shall be the duty of each Judge of the courts of the State having criminal jurisdiction to especially give in charge to and have a grand jury of his court especially investigate all offenses defined in this Act, and inquisitorial powers are hereby given to grand juries in the premises. It

shall be the duty of the respective district attorneys of the State, upon the information, at the request of any reputable citizens of the State, to investigate and prosecute *ex officio* all the offenses defined in this Act."

It therefore follows, under the construction placed upon this Act by the Supreme Couprt of Tennessee, that if any person, firm or corporation desires to engage in Tennessee in the interstate transportation of passengers for hire by motor bus, he or it must, before beginning operations, and as a condition precedent to engaging in such business, obtain a privilege tax receipt from the County Court Clerk, and in the case of the 29-passenger bus, as in the instant case, pay the sum of $500.00 therefor.

To do otherwise renders him or it guilty of a crime under the statute in question and liable to a fine of not less than $5.00 nor more than $50.00 per day for each day such privilege is exercised without a license, and it is made the duty of the Criminal Judges to especially charge the grand juries of the State thereto, as well as requiring the district attorneys to prosecute *ex officio* such an offense.

This provision of the Revenue Act in question not only negatives the idea of the levy being an excise upon the use of the roads, but clearly shows that the Act is an exercise of the taxing power and renders the statute unconstitutional and void, since the Su-

preme Court of Tennessee has held that the said Act applies to exclusive interstate bus operations.

Barrett v. *New York*, 232 U. S., 30, 31, 58 L. Ed., 490.

The Court said in the above cited case:

"But, if the above mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that, so construed, they would be clearly unconstitutional."

"A State is inhibited from conditioning the right to engage in interstate commerce on the payment of an occupation tax.

Sprout v. *South Bend*, 277 U. S., 163, 171; 72 L. Ed., 833, 837; 48 S. Ct. Rep., 502.

The Supreme Court of Tennessee suggests that the levy is an excise under an exercise of police power.

Even though the statute in question was enacted under the police power, such does not justify the imposition of a direct burden upon interstate commerce.

Barrett v. *New York*, 232 U. S., 31; 58 L. Ed., 490.

Smith v. *Alabama*, 124 U. S., 465; 31 L. Ed., 508.

Hennington v. *Georgia*, 163 U. S., 299; 41 L. Ed., 166.

Lake Shore & M. S. R. Co. v. *Ohio*, 173 U. S., 285; 43 L. Ed., 702.

Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license.

Barrett v. *New York*, 232 U. S., 31; 58 L. Ed., 490.

Crutcher v. *Kentucky*, 141 U. S., 47; 35 L. Ed., 649, 652.

Robbins v. *Taxing District*, 120 U. S., 489, 496; 30 L. Ed., 694, 697.

Leloup v. *Mobile*, 127 U. S., 640, 645; 32 L. Ed., 313.

As was stated by the Supreme Court of the United States in *Crutcher* v. *Kentucky*, *supra*, "a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

CONCLUSION

Six errors have been assigned by appellant, Interstate Transit, Inc., in this Honorable Court, which errors are substantially the same, except that the proposition of law involved in the case is stated in different forms. Hence, the preceding brief and argument does not present same seriatim.

It is earnestly insisted by appellant, Interstate Transit, Inc., that the decree and judgment of the Supreme Court of Tennessee, sustaining the validity of Chapter 89 of the 1927 Acts of Tennessee, is erroneous, and that said Act is repugnant to the Commerce Clause of the Federal Constitution.

We, therefore, ask that the decree of said Supreme Court of Tennessee be reversed and judgment entered here for the Interstate Transit, Inc., so as to correct such error.

Dated this 23rd day of February, 1931.

Respectfully submitted,

THOS. L. TALLENTIRE,
J. CARLTON LOSER,
H. LYNNE BARBER,
J. G. LACKEY,
Counsel for Appellant, Interstate Transit, Inc.

APPENDIX

Statutes of Tennessee referred to in foregoing brief are set out below:

CHAPTER NO. 89
REVENUE BILL
SENATE BILL NO. 589

(By Sub-Committee of Finance, Ways and Means Committee of both Houses.)

AN ACT entitled "An Act to provide for General Revenue for the State of Tennessee and the Counties and municipalities thereof, to be known as the General Revenue Bill."

SECTION 1. *Be it enacted by the General Assembly of Tennessee*, That the taxes on every One Hundred ($100.00) Dollars' worth of property shall be twenty (20) cents for the year 1927, and every year thereafter; seven (7) cents of which shall be for State purposes, five (5) cents for the University of Tennessee, and eight (8) cents for Elementary and Rural Schools. There shall be levied and collected a direct and collateral inheritance or transfer tax, as now, or may be hereafter provided by law, and nothing in this Act shall be construed to amend or repeal any of the provisions of said law.

SECTION 2. *Be it further enacted*, That the several County Courts of this State be, and they are, hereby authorized and empowered to levy an annual County Tax on every One Hundred ($100.00) Dollars of taxable property, not exceeding twenty (20) cents upon the One Hundred ($100.00) Dollars' worth of property, and exclusive of the tax for public roads and pikes and schools, and interest on county debts, and other special purposes, and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and other such vocations, occupations or business as are named in this Act and declared to be privileges, not exceeding in amount that levied by the State for State purposes, and except as hereinafter provided. The imposition of a privilege tax under this Act shall not be construed as a release or exemption from an ad valorem tax, nor shall this Act be construed as repealing any special Act heretofore passed, imposing a privilege tax; provided, that any indigent ex-Confederate or ex-Federal soldier of the war of 1860-64, or the Spanish-American War, or any indigent soldier of the World War doing a privilege business, with a capital not exceeding Five Hundred ($500.00) Dollars, he being the sole beneficiary of said business, shall be exempt from paying the privilege tax herein provided for.

SECTION 3. *Be it further enacted*, That all merchants shall pay an ad valorem tax upon the cap-

ital invested by them in their business, in the same manner as all other property is assessed for ad valorem taxation; but the value of such capital shall be arrived at as provided in Section 26, and subsections thereof, of Chapter 602 of the Public Acts of 1907, known as the "Assessment Act"; and in addition thereto shall pay a privilege tax as hereinafter provided.

SECTION 4. *Be it further enacted,* That each vocation, occupation and business hereinafter named in this section, is hereby declared to be a privilege, and the rate of taxes on such privilege shall be as hereinafter fixed, which tax shall be paid to the County Court Clerk, as provided for the collection of such revenue.

* * * *

AUTOMOBILE BUSSES OPERATING UPON THE HIGHWAYS OF THIS STATE AND RUNNING INTO OTHER STATES, NOT LIABLE UNDER THE FOREGOING PROVISIONS.

(State Privilege Tax only.)

Each person, firm or corporation operating an automobile bus carrying passengers upon the highways of this State for a distance of more than ten miles per trip, and not liable for a

privilege tax under the foregoing provisions, shall pay as follows:

Each bus carrying 5 passengers or less, per annum	$ 50.00
Each bus carrying over 5 passengers and not more than ten passengers, per annum	100.00
Each bus carrying over 10 passengers and less than 15 passengers, per annum	200.00
Each bus carrying 15 passengers and less than 20 passengers, per annum	350.00
Each bus carrying over 20 passengers and less than 30 passengers, per annum	500.00
Each bus carrying over 30 passengers, per annum	750.00

Provided, that this tax shall be in lieu of all county and municipal taxes; Provided, further, privilege taxes accruing under this heading shall go and belong exclusively to the General Funds of the State.

* * * * *

SECTION 12. *Be it further enacted*, That any and all parties, firms or corporations exercising any of the foregoing privileges must pay the tax as set forth in this Act for the exercising of said privileges, whether they make a business of it or not, unless otherwise provided; and this Act shall not be so construed as to exempt any person, firm, or corpora-

tion whatever exercising any of the foregoing privileges, from the payment of the tax herein prescribed for the exercise of said privilege except as herein provided, and except as provided in Chapter 121, of the Acts of 1869 and 1870, except State and County fairs and their tenants.

That it shall be unlawful for any person, firm or corporation to exercise any of the foregoing privileges before complying with the provisions of this Act; and any one exercising any of the foregoing privileges without paying the tax prescribed shall be guilty of a misdemeanor, and liable to a fine of not less than $5.00 nor more than $50.00 per day for each day such privilege is exercised without license; provided. nothing herein shall be deemed to prohibit or interfere with interstate commerce.

* * * * *

SECTION 17. *Be it further enacted,* That it shall be the duty of each judge of the courts of the State having a criminal jurisdiction to especially give in charge to and have a grand jury of his court especially investigate all the offenses defined in this Act, and inquisitorial powers are hereby given to grand juries in the premises. It shall be the duty of the respective district attorneys of the State, upon the information or at the request of any reputable citizen of the State to investigate and prosecute *ex officio* all the offenses defined in this Act.

SECTION 19. *Be it further enacted*, That nothing in this Act shall be construed as licensing any character of business that is or may hereafter become unlawful.

And if any part, section, provision or clause of this Act shall be unconstitutional, it shall not affect the validity of any other part or provision hereof.

SECTION 20. *Be it further enacted*, That it shall be the duty of each and every official or agent charged with the collection, reporting and paying over State and County taxes, or other special revenues and privilege licenses, including fees, fines, forfeitures, costs, interest, and/or penalties, as now or may be hereafter prescribed by the laws of this State, to keep a complete record of such collections on books and forms prescribed for and approved by the Commissioner of Finance and Taxation; that they shall report said collections, if it be State revenue, to the State Comptroller, and if it be county revenue to the County Judge, or Chairman of the County Court, on forms prescribed and approved by the Commissioner of Finance and Taxation, as is now or shall hereafter be prescribed by the laws of this State.

SECTION 21. *Be it further enacted*, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed, and this Act shall

take effect from and after May 1, 1927, the public welfare requiring it.

(SIGNED) HENRY H. HORTON,
Speaker of the Senate.

(Signed) SELDEN MAIDEN,
Speaker of the House of Representatives.

Approved May 3, 1927.

(Signed) AUSTIN PEAY, *Governor.*

CHAPTER 58

PUBLIC ACTS 1929

SENATE BILL NO. 90

(By Bratton, Grubb, Candler and Bean.)

AN ACT to provide for the regulation, supervision and control of persons, firms, corporations and associations, owning, controlling, operating or managing motor vehicles used for transporting persons or property for compensation on the public highways of this State; to provide for inspection, control and supervision fees; and to provide appropriate penalties and punishment.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That no person, firm, corporation, association, their lessees, trustees, or receivers, except when such requirement would be

contrary to the Constitution or the laws of the United States or the Constitution of this State, shall operate any motor propelled vehicle (not usually operated on or over a rail or rails) for the transportation of persons or property for compensation on any public highway in any town, city or county in this State, without having first obtained from the Railroad and Public Utilities Commission of the State of Tennessee a certificate declaring that the public convenience and necessity warrant such operation; and all such operation—to the full extent allowed by the Constitution and laws of the United States and the Constitution of this State—shall be subject to control, supervision, and regulation by the said Commission; provided, however, that nothing in this Act contained shall apply to motor vehicles while used exclusively for transporting persons to or from schools, Sunday schools, churches, religious services, of any kind, upon special pre-arranged excursions under the auspices of any religious or charitable organization, or funerals, or while used exclusively for carrying persons and/or their baggage between railroad depots and any points in any city, town, or suburbs thereof, in or adjacent to which such depot is located, or while used exclusively in ordinary taxicab or city transfer service. By "ordinary taxicab or city transfer service," as used in the above proviso and exception, is meant service performed by way of transporting any persons or property for hire between points

in any one city, town, or the suburbs thereof, and which is not performed over or along any definite, fixed, announced or advertised routes between any points in any such one city, town, or the suburbs thereof; but motor vehicles for which passengers are solicited and which are operated to and from points of interest or historic points in or near any city, and which, therefore, perform the same service as a sight-seeing bus, are not excepted from the provisions of this Act, and the provisions of this Act shall apply to such motor vehicles thus operated, whether the same be called busses or for-hire cars or called by any other name.

Provided, further, that nothing in this Act shall prohibit a motor vehicle from making casual trips on call or under contract solicited by the party served, for the purpose of carrying passengers, provided that on said casual trips no one shall be allowed to pick up any passenger along the route, nor be permitted on the return trip to carry any passenger other than those included in the original trip; nor shall this Act or any provisions hereof affect or apply to persons, firms or corporations operating trucks or other motor vehicles for the sole purpose of transporting or delivering milk or milk products from the producer for delivery to the purchaser from the producer, nor shall this Act or any provisions hereof affect or apply to persons not engaged in the business of transporting property or freight for compensation who may be called upon as private car-

riers to haul or transport freight or property when the regular carriers holding certificates of convenience and necessity cannot or will not furnish adequate means of transporting the same.

Nothing in this act shall apply to any motor vehicle used to convey perishable farm products, or live stock, to market, the owner of which vehicle holds no certificate of public necessity and convenience, and only operates such vehicle in cases of emergency. Provided, this Act shall not apply to carriers of either freight or passengers who make occasional trips.

SECTION 3. *Be it further enacted,* That such certificate of public convenience and necessity, when once issued, may be assigned or transferred, but no such certificate shall be so assigned or transferred, without the approval of said Commission.

Provided, that when any motor carrier holding a certificate of convenience and necessity sells his entire property and business for the purpose of having his operations continued by the purchaser, and the Commission approves the transfer of the seller's certificate of convenience and necessity, then there shall be paid to the State of Tennessee twenty-five (25) per cent of the purchase price over and above the value of the physical properties and going value sold—the value of the physical properties and going value sold to be fixed by appraisal to be made by the Commission.

No motor vehicle shall be operated upon any such public highway in this State for the purpose of transporting passengers or property for hire by virtue of such certificate until there shall have been filed with the Commission a bond, indemnity undertaking, or policy of insurance executed by a company, mutual association or reciprocal exchange legally authorized to execute such instruments in the State of Tennessee and approved by said Commission, in such reasonable amount and under such terms and conditions as said Commission may prescribe; and such bond, indemnity undertaking or policy of insurance shall be conditioned to pay any judgment rendered against such certificate holder and/or operator (within the limits of said bond, policy or undertaking) as the result of damage from personal injury or damage to property arising out of the actual operation of such vehicles, or for damage to or loss of prperty while in the possession of or under the control of any such operator in this State; and for failure upon the part of the operator and/or certificate holder continuously to maintain such bond, policy or undertaking in force, shall subject such certificate to revocation.

* * * * *

SECTION 7. *Be it further enacted*, That on or before the 31st day of December of each year, each and every operator of any motor-propelled vehicle or vehicles, subject to the control and jurisdiction of said Railroad and Public Utilities Commission of the State of Tennessee, shall pay to the State of Ten-

nessee, at such times and in such installments as said Commission may require, a fee for the inspection, control and supervision of the business, service or acts of such operator, and such fee shall be paid by each such operator in addition to any and all property, franchise, license and other taxes, fees and charges now or hereafter fixed, assessed or charged by law against such operators. The amount of such fee so to be paid by each operator shall be the sum of Two Dollars ($2.50) and Fifty Cents per annum, per passenger seat provided for passengers in each such vehicle, and the sum of Ten ($10.00) Dollars per annum per ton of carrying capacity provided for property in each vehicle. Said Commission, under Rules promulgated or orders made by it, may require the payment in advance of the above fee from each such operator, or may require bond and security, satisfactory to said Commission, to secure such payment, if same be not required to be made in advance; and said Commission, under rules promulgated or orders made by it, shall have power to apportion the payment of such fee by any operator or operators for any poportionate part or parts of any year while such operation continues. In no case shall said fee to be paid by any such operator be less than Ten ($10.00) Dollars, which shall be the minimum inspection, control and supervision fee to be paid by any operator subject to such fee for any year, or part thereof. It shall be the duty of the Comptroller to collect said fees from said operators, as required by the rules and orders of said Commission, and to

keep a separate account of the fees so collected, to be known as the "Motor Vehicle Account," the funds so raised to be segregated. Any funds remaining in said Motor Vehicle Account at the end of the year shall be carried over from year to year and expended only for the purposes specified in this Act. In case of default in the payment of any such fee, or part thereof, when same shall become due, any such operator in default shall be liable to a penalty of ten (10) per cent per month, on the amount of the fee, which may be recovered by suit of the State, for every month it remains in default; and any such penalty, as well as all such fees, when collected, shall be covered into the State Treasury as a part of said Motor Vehicle Account, provided that out of any such penalty the Comptroller may employ and pay counsel, who shall have power to institute suit in any court of competent jurisdiction in this State for the recovery of any such delinquent fee and penalty, but, in no event, shall anything more than the penalty be allowed to such counsel for making such collections. A lien is hereby declared, and shall exist, upon all the property of each such operator coming within the provisions of this Act, for the payment of the fees prescribed by this Act, together with all penalties accruing hereunder, which lien shall be superior to all other liens, except, for Federal, State, county and municipal taxes. The inspection, control and supervision fee provided to be paid by this Act shall be the only fee and charge to be paid by and collected from such operators to cover the ex-

pense of inspection, control and supervision. Said Railroad and Public Utilities Commission of the State of Tennessee is hereby empowered to employ such rate experts, attorneys, accountants, inspectors, examiners, clerks, agents or other employes, and assign to them such duties as it may deem necessary to enable it fully to perform the duties, and to exercise the powers conferred by this Act upon said Commission. The compensation of any person employed under the authority of this Act shall be paid by the Commission, and paid from the fund in the "Motor Vehicle Account," but not otherwise, and said Commission shall not have the power to contract for any services, in connection with the administration of this Act, for which payment shall be made in any other way, or manner, by the State, or derived from any other source than the "Motor Vehicle Account," herein provided for. Any person or persons employed by said Commission under the authority herein given, may be assigned by said Commission, to investigate, hear, and where possible, adjust, any individual or general complaint made by any person against such operator, wherein the investment, property, service or charges of any operator or claims preferred against any operator may be involved; and may hear and take proof, and in the event he is unable to effect a satisfactory adjustment of any such complaint, then it shall be his duty to certify the same to said Commission, with his recommendations in the premises, whereupon said Commission shall, after hearing, make its final

order, which shall be binding upon the parties to any such controversy.

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SECTION 10. *Be it further enacted,* That every officer, agent or employee of any corporation, or any other person, who willfully and deliberately violates or fails to comply with, or who procures, aids or abets in the violation of the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof for the first offense shall be punished by a fine of $50.00; for the second offense shall be punished by a fine of $100.00; for the third offense shall be punished by a fine of $500.00 or by imprisonment for a period not exceeding one year, or both; said fine and imprisonment at the discretion of the court. Each day any provision of this Act is violated shall constitute a separate offense.

SECTION 11. *Be it further enacted,* That every officer, agent or employee of any corporation and every other person who fails to obey, observe or comply with any order, decision, rule, regulation, direction, demand, or requirement of said Railroad and Public Utilities Commission of the State of Tennessee made in pursuance of the power and authority conferred by this Act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding Five Hundred ($500.00) Dollars, or by imprisonment for not exceeding one year, or by both fine and imprisonment. Each day

any such order, decision, rule, or regulation, etc., of said Commission is violated shall constitute a separate offense; and the fact that there may have been a prosecution for the violation of any such order, decision, rule, or regulation, etc., of said Commission under this section shall not operate to prevent or limit the exercise of the authority of the Commission to suspend, revoke, alter or amend certificates as provided in this Act.

SECTION 15. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

CHAPTER NO. 58
HOUSE BILL NO. 525
(By Mr. Hall.)

AN ACT requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to *five cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used in the construction and maintenance of a highway system in the State.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That as used in this Act, the term "person" means and includes every individual, firm, association, joint stock company, syndicate and corporation.

The term "distributor" means and includes every person who engages in the business in the State of refining, manufacturing, producing or compounding gasoline or distillate, and selling the same in this business in this State of shipping, transportng or importing any gasoline or distillate into, and making original sales of the same, in this State.

The term "dealer" means and includes every person, other than a distributor, who engages in the

business in this State, of distributing or selling gasoline or distillate within this State.

SECTION 2. *Be it further enacted*, That every distributor shall, for the year 1923, and each year thereafter, when engaged in such business in this State, pay to the State Comptroller, for the exclusive use of the State, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this State, in an amount equal to *five cents for each gallon of gasoline, and five cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor into, and distributed or sold by him within this State, during such year; provided, however, that no gasoline or distillate distributed or sold by any such distributor in the original packages in which the same was shipped, transported or imported into this State, shall be included or considered in determining the amount of such privilege tax, but only such gasoline and distillate as has been sold or distributed by such distributor, after the breaking of the original packages in which the same was shipped, transported or imported into this State shall be included or considered in computing the amount of the privilege tax to be paid by such distributor; provided, further, that all gasoline and distillate distributed by any distributor to any of its service stations in this State shall be deemed to have been sold, and shall be treated in the same manner as

though the same had been sold to dealers or other persons.

SECTION 3. *Be it further enacted*, That every dealer shall for the year 1923, and each year thereafter, when engaged in such business in this State, pay to the State Comptroller, for the exclusive use of the State, a special privilege tax, in addition to all other taxes, for engaging in such business in this State, equal to five cents for each gallon of gasoline and five cents for each gallon of distillate sold or distributed by such dealer in this State during such year. Provided, however, that no gasoline or distillate sold or distributed by such dealer, and which was refined, manufactured, produced or compounded and sold by a distributor in this State, and no gasoline or distillate sold by such dealer which, when purchased by him, other than was contained in containers or packages in which the same was shipped, transported or imported into this State, shall be included or considered in determining the amount of such privilege tax to be paid by such dealer, but only such gasoline and distillate as was shipped, transported or imported into this State, and purchased by such dealer in the original packages in which so shipped, transported or imported into this State, and then resold by such dealer after the breaking of such original packages by him, shall be included or considered for the purpose of computing the amount of such privilege tax.

SECTION 12. *Be it further enacted*, That it shall be the duty of the State Comptroller to collect all taxes accruing under this Act and to issue proper receipts therefor and to pay over all taxes so collected to the State Treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the Highway System of the State, and no part of said fund shall be used in any other department or for any other purpose whatsoever.

SECTION 13. *Be it further enacted*, That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed; and that this Act take effect on April 1, 1923, the public welfare requiring it.

Passed March 14, 1923.

F. S. HALL,
Speaker of the House of Representatives.

EUGENE J. BRYAN,
Speaker of the Senate.

Approved March 14, 1923.

AUSTIN PEAY,
Governor.

(Pages 150-156 Public Acts of Tennessee for 1923.)

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*The above quoted Act of the General Assembly of Tennessee originally levied a tax of two cents per gallon on gasoline, but subsequent amendments to said Act have increased said tax until it is now five cents per gallon.

CHAPTER NO. 73

HOUSE BILL NO. 1033

(By Messrs. Bond, Davis of Wilson, Ashley, Bratton.)

AN ACT to amend Chapter No. 8 of the Public Acts of 1915, entitled "An Act to be entitled an Act to require the registration of automobiles, motorcycles and other motor propelled vehicles; to require an annual registration of all such vehicles, to provide for a payment of a fee for all such registration and to provide a penalty for violation of this Act;" to provide for the payment of certain fees to the County Court Clerk of the various counties; and to empower certain county and state officials with the enforcement and administration of this Act and of the funds collected by the provisions of this Act.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Chapter 8 of the Acts of 1915, passed January 29, 1915, entitled, "An Act to be entitled an Act to require registration of automobiles, motorcycles and other motor propelled vehicles; to require the registration of all such vehicles; to provide for a payment of a fee for all such registration and to provide a penalty for violation of this Act," be amended so as to read as follows:

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SECTION 4. *Be it further enacted*, That the owner of such vehicle is hereby required to display, in a conspicuous manner, at both front and rear of such vehicle, a number plate of size, color, dimension and character as the State Department of Highways may designate, provided, that the size of the number plate shall be the same each year. The number plate shall show, in addition to the registration number of such machine, the year and the abbreviation of Tennessee. Provided, further, that the State Department of Highways through the County Court Clerk shall furnish, without additional cost to the owner of such machine, a set of two number plates, and owners are required to use these number plates on their machines, and no other number plates shall be used.

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SECTION 6. *Be it further enacted*, That each owner of a motor vehicle, motorcycle, auto truck or like vehicle shall annually hereafter, on or before the first day of January of each year, make application to the State Department of Highways through the County Court Clerk for annual registration, giving the same information and paying the same fees as required in an original registration including re-registration with the County Court Clerk, and upon payment of such fees shall receive from the State Department of Highways, through the County Court Clerk a certificate showing such registration, and shall also receive from the State Department of

Highways through the County Court Clerk a set of two number plates on which shall, in addition to the registration number, have the year and the abbreviation of Tennessee.

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SECTION 7. *Be it further enacted,* That it shall be the duty of the County Court Clerk of each county to collect the fees herein provided and to enforce the provisions of this Act; it shall be his duty to ascertain the names of the owners of all automobiles, motor trucks, motorcycles and vehicles of like character in his county and to issue distress warrants against any such owner who is operating such vehicle in violation of the provisions of this Act after March first of any year, in which case the usual distress warrant fees shall obtain; he shall take registration applications from the owners of all such vehicles specified in this Act; shall collect the fees provided in this Act; shall distribute the number plates provided by the State Department of Highways; shall keep a complete record in his office for the benefit of the general public of all such vehicles registered in his county; shall deposit daily in some State depository in his county designated by the State Treasurer all highway or road funds collected under this Act for the State, said funds to be deposited to the credit of the State Treasurer for the State Highway Fund; shall make a report not later than the fifth of each month to the

State Treasurer or Comptroller showing the amount of such deposits, and shall make a report not later than the fifth of each month to the State Department of Highways showing number in numerical order of each number plate issued during the preceding month and give the name and address of the person to whom issued and the amount collected, and shall account to the State Department of Highways for all number plates consigned to him; he shall collect from the owner making application for registration of a vehicle a fee of twenty-five cents, which shall be his compensation in full; and it shall be the duty of the State Treasurer to designate to the County Court Clerk in each county a State depository in such county in which the funds collected under this Act shall be deposited; he shall keep an accurate and separate account of such funds and shall on the first day of March, June, September and December, or as much oftener as may be required by the State Department of Highways, withdraw from each of such banks ten per cent of the funds deposited since the last withdrawal, which fund shall be placed in the State Treasury to the credit of the State Department and for the payment of all the costs to the department for the collection of such fund, which shall include cost of number plates, printing certificates and other printing pertaining to collection of such fund, postage, clerical help, and such other expense as may be incurred

by the department in the collection of this fund, which ten per cent shall constitute the sole amount that may be withdrawn from this fund. The remainder of the fund shall be expended in the county from which collected, under the direction and supervision of the State Highway Department in co-operation with the regular legally constituted road authorities of the county in the maintenance of State highways, and the State Highway Department and the legally constituted road authorities of all counties shall co-operate with each other in the expenditure of this fund as provided in Chapter 100 of the Public Acts of Tennessee, 1915; provided that said fund shall be deposited as the State and county highway fund and shall be drawn out only on vouchers signed by the Chairman of the State Highway Department and the Secretary for road work in the county where collected as herein provided; provided, further, that the County Courts of counties shall direct the expenditure of all of this fund when the State Department fails to do so by May 1st of each year, and the State Highway Commission shall in that case pay to each county its share as said county expends it as directed by the legally constituted road authorities of the county.

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SECTION 11. *Be it further enacted*, That all laws in conflict with this Act be, and the same are, hereby repealed, and that this Act take effect on the

twenty-third day of April, 1917, the public welfare requiring it.

Passed April 5, 1917.

CLYDE SHROPSHIRE,
Speaker of the House of Representatives.

W. H. CRABTREE,
Speaker of the Senate.

Approved April 7, 1917.

TOM C. RYE,
Governor.